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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JOSEPH MCVEIGH, Plaintiff and Appellant, v. CITY OF LA QUINTA, Defendant and Respondent; CASE SWENSON et al., Real Parties in Interest and Respondents.	E069020 (Super.Ct.No. RIC1606159) OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed.

Chatten-Brown & Carstens, Douglas P. Carstens, Amy Minteer and Michelle Black for Plaintiff and Appellant.

Rutan & Tucker and M. Katherine Jenson for Defendant and Respondent.

Demetriou, Del Guercio, Springer & Francis, Jeffrey Z.B. Springer and Jennifer T. Taggart for Real Parties in Interest and Respondents.

Plaintiff and appellant Joseph McVeigh (Plaintiff) appeals the denial of his petition for writ of mandate (California Environmental Quality Act; state planning and Zoning Law; and La Quinta Municipal Code) (Petition) brought against the City of La Quinta (City) and real parties in interest Case and Lisa Swenson (Real Parties). Real Parties sought approval from the City to build a 5,929-square-foot single family residence on approximately 3.16 acres near the Santa Rosa and San Jacinto Mountains in La Quinta (Project). The Project was part of the luxury home development Enclave Mountain Estates (Enclave).

Plaintiff, who owned a single family residence adjacent to the Project in the Enclave, objected to the City planning commission's decision to issue a conditional use permit and adopt a mitigated negative declaration (Negative Declaration) pursuant to the California Environmental Quality Act (CEQA; Public Resources Code,[1] § 21000 et seq.) for the Project. Plaintiff argued the City had to prepare an environmental impact report (EIR) because there was a fair argument the Project would have significant adverse land use, hydrological, aesthetic, biological and noise impacts. Plaintiff also contended that allowing residential development on land that was designated in La Quinta's 2035 general plan (General Plan) as natural open space was inconsistent with the General Plan and state planning laws and zoning ordinances. The City's planning commission

[1] All further statutory references are to the Public Resources Code, unless otherwise indicated.

unanimously approved the Negative Declaration and conditional use permit for the Project. Plaintiff's appeal to the city council was also unanimously denied. The trial court denied the Petition.

Plaintiff raises the following issues on appeal: (1) there is a fair argument supported by substantial evidence that the Project is inconsistent with the General Plan natural open space designation resulting in land use impacts requiring an EIR, and the Negative Declaration did not adequately discuss these issues; (2) the City violated CEQA by failing to prepare an EIR instead of a Negative Declaration based on the fact (a) the Project may have significant hydrological impacts from the polluted runoff and flooding, and the City improperly deferred mitigation until after the Project was approved; and (b) the Project may have significant aesthetic impacts from the removal of scenic ridgelines and the degradation of scenic views; (3) the conditional use permit was improperly granted because the Project violated state planning laws because it was inconsistent with the General Plan land use designation since the land on which the Project would be built was designated as natural open space, which allowed for no development; and (4) a conditional use permit could not be granted as it violated La Quinta Municipal Code section 9.110.070 and 9.140.040 (hereinafter, Municipal Code) placing the Project within the hillside conservation overlay, which prohibited development.

In a footnote in the respondents' brief, the City and Real Parties stated the City could have relied on a categorial exemption embodied in the Guidelines for Implementation of California Environmental Quality Act (Cal.Code Regs., tit. 14, § 15303, subdivision (a)) (hereinafter, Guidelines), which exempts single family

residences from CEQA review. We asked the parties to address why the City did not invoke the exemption, whether the City had waived or was estopped from raising the issue on appeal, and the proper remedy. The City and Real Parties responded that the City acted "conservatively" in not applying the exemption but that it had not waived the right to raise the issue in the appeal of the Petition. The City and Real Parties now insist the Project was exempt from CEQA. In response, Plaintiff contends that the City found at the outset the Project would have a significant impact on the environment, not qualifying the Project for the exemption. Further, such categorical exemption could not be raised for the first time on appeal.

The trial court properly denied Plaintiff's Petition.

FACTUAL AND PROCEDURAL HISTORY[2]

A. DOCUMENTS PREPARED AND SUBMITTED FOR THE APPLICATION TO BUILD THE PROJECT

The Project consisted of construction of a 5,929 square foot residence, a pool, and a viewing area on 3.16 acres in the Enclave within the La Quinta Resort Specific Plan

[2] In the trial court and in the proceedings before the city council and planning commission, Plaintiff raised numerous environmental impacts. However, on appeal, Plaintiff only refers to the land use, aesthetics and hydrology. As such, we will focus on these relevant facts. Additionally, the administrative record in this case consists of excerpts from documents and is not organized in any identifiable fashion making it difficult on this court to identify which documents were presented at what time, and in front of which agency. We have done our best to provide a chronological statement of facts.

(Specific Plan). The Project was adjacent to the "Santa Rosa and San Jacinto Mountains Conservation Area" of the CVMSHCP.[3]

The Specific Plan was adopted in 1975 to create a community with homes, a golf course, hotel and condominiums. The Specific Plan had a planning area map. "Area III" was entitled "Santa Rosa Cove and Residential." Its boundary went up to the mountain slope and included the Project site. It was zoned low density residential. It allowed for 91 residential custom lots. Area V was natural open space and appeared within the mountain range behind the Project site. In 1980, the County of Riverside Board of Supervisors approved the rezoning of the Project site from R-5 to R-2-10,000 allowing for 15 units to be built on the Project site. This was incorporated into a 1982 amendment to the Specific Plan. In 1990, the city council approved the Project site be changed to two single family residence lots. In 1996, the Project site was reverted back to a single family residence lot and was considered tract No. 28335-R. The Specific Plan was amended several times after 1990, but the designation of the Project site was never changed to residential.

In March 2013, a preliminary review of the proposal for the Project was conducted by the City prior to the formal application. In that review, the City offered its opinion on land use and zoning consistency. It recognized that under the General Plan, the Project site was designated as natural open space with hillside conservation overlay, which protected specific hillside areas. The initial review found the Project site was within

[3] Coachella Valley Multiple Species Habitat Conservation Plan.

Area III of the Specific Plan and was zoned residential. The Project site was not subject to the hillside conservation overlay provisions of the Municipal Code because the Specific Plan preceded the hillside conservation overlay. Further, development in natural open space area was allowed with a conditional use permit. The City did conclude that because of the lot being elevated, since it was a hillside development and because it had surrounding existing homes, that several reviews and studies would be required for the conditional use permit and under CEQA.

Real Parties were instructed to submit an environmental information form and a conditional use permit application. Real Parties were required to prepare several studies, including an archaeological survey, biological study, a water quality management plan, hydrology report, grading plan, soils report and rockfall study. Real Parties were advised to negotiate with the Enclave Mountain Estates Homeowner's Association (Enclave HOA) as to what it would require for approval for the design of the Project, since the City determined the Project was part of the Enclave HOA.

The Enclave HOA and Real Parties entered into several settlement agreements in March and December 2015 as to the design of the Project and retaining walls. The settlement agreement included the design of the drainage system; the color palette of the home and retaining walls; and landscaping, which included installing numerous trees. It was clear to the Enclave HOA that the Project site was part of the Enclave HOA.

In March 2015, the architects for the Project submitted an amendment to the Project to the City. The house itself had been moved back on the Project site and had been reduced in size. The building pad had been lowered to 87 feet above sea level. The

submission included a map of the Enclave Estates area with square footages for the surrounding single family residences. The home directly below the Project site was 6,039 square feet. Most of the other homes exceeded 4,000 square feet. The map showed the Project site was surrounded on three sides by existing homes.

The City hired Nicole Criste as a consulting planner. She received complaints from the neighbors as to the Project. Plaintiff submitted a letter complaining about the numerous environmental problems and inconsistency with the General Plan.

In January 2014, the City received geological reports and grading plans from Real Parties, prepared by Earth Systems Southwest. A historical/archaeological report was prepared in May 2013. It showed a view of the Project site from the mountain behind. It did not appear to be much higher than the other residences surrounding it. It also showed that there was an existing dirt road and a flattened, graded building pad already on the Project site.

A report was prepared for Real Parties in May 2013 regarding the slope and development of the Project site. On the 3.16 acres, 2.35 acres were greater than 20 percent slope. The area with the existing road and building pad was less than 20 percent slope. The existing road was to be widened to 18 feet. A viewing area above the home would be built but would not be visible outside the residence as it would be surrounded by natural rock. Only 1.10 acres on the Project would be disturbed. A portion of that area (.80) had already been disturbed. The remaining 2.16 acres would be left as natural open space. Retention walls would have to be built. There would be an extensive drainage system.

A preliminary water quality management plan was prepared by the Altum Group for Real Parties on October 9, 2013, and revised on May 7, 2015. A hydrology report was prepared and revised on May 7, 2015, for issuance of the conditional use permit. It noted an existing drainage channel ran along the southerly property line. Most of the runoff from the Project site currently went to the golf course. Some runoff went to the street. Improvements to the drainage system included the installation of drainage pipes diverting water to a retention system or the existing flood control channel, once the Project was completed. The pipes and underground retention system would keep water off of the access road. Only .6 acres of the property was being developed and the water retention capture system addressed in the report only considered the developed areas. The exact specifications of the drainage pipes and retention system would be prepared with the construction documents.

A March 26, 2013, geotechnical engineering report was prepared. There were recommendations for cuts in the bedrock slope and for removal and retention of large rocks. It also recommended deepening the existing road before paving. Retention walls would have to be built. Trenches would have to be built. It also provided for extensive drainage systems.

Extensive field work was completed to determine if there were any animal species on the Project site. A report was prepared by the Altum Group for Real Parties. No rare or endangered plants were found on the Project site. No animals were found on the Project site. The detection of possible Peninsular Bighorn sheep was found 200 yards away up the hill, which gave the possibility they would go into the Project site but there

was no indication of their presence on the Project site. It was recommended that during construction a monitor be present to ensure no disturbances if a Peninsular Bighorn sheep was seen. It was unlikely the Project would have significant adverse impacts on the surrounding "native biota." The report concluded that the site was immediately adjacent to residential development, was small in scope (impacting less than two acres), and had already been graded.

Plaintiff hired his own hydrological expert. That expert concluded the water quality management plan did not comply with the required hydrological conditions for run off. He was concerned the retention system was inadequate because Real Parties' expert only addressed the developed areas. Plaintiff submitted a letter complaining about all of the hydrological, biological, and aesthetic issues with the Project.

B. PROPOSED NEGATIVE DECLARATION

The City gave notice on December 30, 2015, that it was considering adopting a Negative Declaration and a conditional use permit for the Project. It described the Project as construction of a 5,929 single family residence on 3.16 acres in the Enclave within the Specific Plan. The City stated "As mitigated, no potentially significant effects on the environment are anticipated as a result of this project; therefore, a Negative Declaration has been prepared in accordance with [CEQA]." The public was invited to comment and a hearing would be set. A satellite map showing the project site was included. It circled the area of the Project, which was surrounded on three sides by seven other large single family residences. Behind the lot were mountains. Behind and to the west, a golf course went further up into the mountains. On the other side of the mountain

behind the Project was a subdivision of houses, which appeared to go higher up into the mountain area than the Enclave.

The notice included the environmental checklist form used by the City. As for aesthetics, in all categories—including whether it would have an effect on a scenic vista, substantially damage scenic resources, substantially degrade the existing visual character or quality of the site or create a new source of substantial light or glare—the City found the Project would have a "less than significant impact."

The City noted the Project site was 40 feet higher than surrounding residential properties. The pad was going to be reduced from 91 feet above sea level to 87 feet. It noted, "The project will be visible from homes in the immediate vicinity, but is designed in a manner that reduces visual impacts to a great extent." The proposed colors and design complemented the desert environment. The Project once completed with landscaping would have a less than significant impact on a broader scenic vista. From the east, the Project would be not visible because of an existing ridgeline. The home itself was only going to be on one acre with the remaining two acres essentially undisturbed, which would maintain the highest slopes on the northern and eastern portions of the Project. It would be a single story home. Photographic simulations of the Project prepared by Real Parties' expert showed the views from nearby residences once the Project was built; they were attached as exhibits.

Several photographs of the existing Project site were provided. They depicted the existing graded building pad, which was already cleared of any vegetation.

The Negative Declaration addressed hydrology and water quality issues. It found less than significant impacts or no impact. The Project would be subject to the City's requirement for surface water pollution prevention. The City required a storm water pollution prevention plan and a water quality management plan to address and prevent pollution during construction and long-term operations at the Project. Runoff from the existing site flowed down the concrete-lined drainage channel and a retention basin was going to be built on the southerly portion of the site. The debris flow from the site was considered low. An easement to the concrete channel, which would direct runoff to that location, was continuing.

The proposed Negative Declaration provided, "The City has required the preparation of a hydrology study for the project site. The City's standard requirements will be imposed on the proposed project, to retain the 100 year storm on site, and to design flood control facilities that do not increase currently occurring volumes or velocities as they discharge to downstream properties." This would include an underground retention system for capturing debris. The Negative Declaration concluded, "The hydrology study will continue to be reviewed by the City Engineer, to assure compliance of the proposed project with all City's standards relating to flood control." The impact associated with flooding would be less than significant.

The proposed Negative Declaration also considered the land use and planning impacts. The City recognized that the Project was "immediately surrounded" on the south and west by other single family residences. The City noted that the land on which the Project was being constructed was designated natural open space in the General Plan

and natural open space with hillside conservation overlay in the zoning ordinance. The City recognized the Project was within Area III of the Specific Plan, which allowed a residence on the lot. The City concluded "The processing of the Conditional Use Permit is consistent with the City's standards, in both its General Plan and Zoning Ordinance, relating to development in the hillsides. With approval of the Conditional Use Permit, the project will be consistent with the General Plan and Zoning Ordinance."

The City also included an analysis of the biological resources, cultural resources, mineral resources, noise, population and housing. No significant impacts were noted for noise beyond what was typical for construction projects. A limited area needed to be excavated, which would keep down the noise levels. The noise levels once the Project was completed would be equal to the surrounding single family residences.

C. PLANNING COMMISSION DETERMINATION

On January 12, 2016, planning commission staff submitted responses to comments from residents regarding the conditional use permit and Negative Declaration. The surrounding residents were concerned about flooding, wildlife, visual impacts and inconsistency with zoning laws. The planning commission staff provided there were no known noise impacts beyond what was normal for single family residences. Also, there would be no significant impact after the implementation of mitigation measures. This was not a wildlife corridor; the Project was surrounded by homes. The home on the Project site would mask the retaining wall from view. The construction noise would be consistent with other construction sites and was permissible by the Municipal Code. Further, the disagreement between experts as to the hydrological studies did not require

an EIR; the City continued to evaluate the drainage issues. In fact, the current Project site allowed for water to flow freely and the improvements would actually decrease runoff. The Project was in Specific Plan Area III and was not inconsistent with the General Plan.

On January 20, 2016, Plaintiff's attorney sent a letter to Criste regarding the objections to the approval of the Negative Declaration and Project. An EIR had to be prepared to comply with CEQA. The Negative Declaration was inadequate as it failed to adequately address the biological, noise, hydrological and aesthetic impacts. Further, it did not address the inconsistent land use impacts. Moreover, it was inconsistent with the Specific Plan. Plaintiff's attorney attached a photograph purporting to be a Peninsular Bighorn sheep on the Project site. She also attached a list of "Special Animals" but no further information regarding these animals being on the Project site.

On March 2, 2016, the expert hired by Real Parties to do the biological study submitted a letter to Criste responding to objections to the biological assessment on the Project site. The objections were submitted by Plaintiff's attorney, who had no biological expertise. The ecological consultant insisted the Project would have no impact on any wildlife species.

In January 2016, several nearby residents sent letters to Criste in regards to their objection to the issuance of the conditional use permit and Negative Declaration for the Project. The Project conflicted with the Municipal Code. They insisted the Project would be visible from "miles away." They claimed that 12 feet of the existing mountain face would be removed; the driveway would be over 400 feet long and 18 feet wide with

retaining walls on both sides; and the Project would destroy the views of other Enclave homes.

On March 8, 2016, the City's planning commission held a hearing on the conditional use permit and Negative Declaration for the Project. Criste reviewed with the planning commission that the Specific Plan provided for residential development and the zoning ordinances allowed a home with a conditional use permit. The Specific Plan existed prior to incorporation of the City of La Quinta. It annexed the Enclave estates; the Specific Plan must take precedence. Significant efforts had been made by Real Parties to blend the home into the surrounding area. Seven homes were around the site and landscaping was proposed to help with privacy. Real Parties prepared visual simulations to assist the planning commission with the aesthetics. Criste recommended approval of a Negative Declaration and conditional use permit.

The architect for the Project testified at the hearing as to the specific plans for the home and the visual impact. The retaining walls would be finished with rock from the site. Story poles were installed on the Project site by an architect employed by Enclave HOA and were used to make the photographic simulations. The Project was designed for optimal privacy of Real Parties and the surrounding neighbors. The tree plantings on the Project site were a requirement of the Enclave HOA.

Plaintiff testified at the hearing. He made his comments regarding drainage and the visual impact of the retaining wall. He hired his own hydrologist who found error in the Real Parties report. Plaintiff argued all of the differences from the Project to the surrounding homes. He was concerned you would see the retaining wall from his home.

Other surrounding residents testified regarding their concerns of privacy and their view. They wanted an EIR prepared and additional story poles installed to get accurate visual simulations. Residents who lived across the golf course were concerned that the Project would allow the residents of the Project home to look directly into their homes.

Other surrounding residents and the Enclave HOA president testified in favor of the Project. The lot was always present—it was known to all surrounding residents that it would be developed in the future—and Real Parties had designed a beautiful home.

The planning commission concluded it would adopt the Negative Declaration and conditional use permit. The conditional use permit complied with Municipal Code section 9.210.020, which regulated the issuance of conditional use permits, which included the consistency with the General Plan. It found, "1. . . . The project site is designated open space on the General Plan land use map, and Low Density Residential on the La Quinta Resort Specific Plan land use map. The Specific Plan provides the localized land use designation for the site. The project is consistent with that designation. [¶] 2. . . . The proposed development, as conditioned, is consistent with the development standards of the City's Zoning Code. The Conditional Use Permit has been conditioned to ensure compliance with the zoning standards of the Low Density Residential zoning district and other supplemental standards as established in Title 9 of the La Quinta Municipal Code. [¶] 3. . . . The Planning Division has prepared Environmental Assessment 2013-630 for this project, in compliance with the requirements of [CEQA]. The Division has determined that although the proposed project could have a significant effect on the environment, there will be not be a significant effect because revisions in the

project have been made by or agreed to by the project proponent and mitigation measures have been incorporated."

On March 18, 2016, Plaintiff submitted a letter that complained he did not have time to comment on the staff report prior to the hearing. He insisted on seeing wildlife, including Peninsular Bighorn sheep, on the Project site. He reiterated all the same concerns, including drainage, visual impact, and inconsistency of planning laws.

D CITY COUNCIL DETERMINATION

Plaintiff appealed to the city council. City council staff prepared a report on the Project. The city council report acknowledged that the Project site was designated natural open space in the General Plan. However, it was subject to the Specific Plan, which designated the Project site as low density residential. The applicable zoning ordinance allowed for the construction of a single family residence in natural open space designated areas if the City approved a conditional use permit. Moreover, although the Project site was in the hillside conservation overlay, it was exempt under Municipal Code section 9.140.040, which in subdivision (c) provides: "The following are exempt from the requirements of this section: tracts and specific plans already approved."

The report noted that the main concerns of those who were against the Project were architectural style, hydrology, and the visual simulations provided by Real Parties. The city council report noted that a comprehensive initial study was done on the Project site. There was no concrete "evidence" that the Project would have significant impacts on the environment.

Further, the visual simulations provided by Real Parties were an accurate depiction of the Project's visual impacts. All information provided by Plaintiff with the appeal was considered at the planning commission meeting. Further, although there was a small error in the hydrology study, all reports would be corrected when the grading permits were approved.

Plaintiff sent a letter to accompany the appeal, dated April 13, 2016. The Project violated the General Plan by affecting the scenic vistas, and removing rocks. Drainage was an issue; significant flooding occurred in 2013 and 2014. Deferral of the hydrological improvements until grading was inappropriate under CEQA.

Accompanying the letter was a memorandum. It included arguments that the General Plan trumped the Specific Plan. Further the natural open space designation did not allow for development. Plaintiff also argued that the Project site was within the Specific Plan Area V, which was natural open space, not Area III. The planning commission erred by failing to require an EIR.

On April 13, 2016, the architect of the Project sent a letter to Criste, the planner, regarding the submission of a photograph to the city council by Plaintiff's counsel, which purported to be proof that Peninsular Bighorn sheep were seen on the Project site. However, the ridgeline was not the same as the one on the Project site. The ridgeline depicted was one-quarter mile from the Project site. The location of the Peninsular Bighorn sheep was actually closer to other already existing homes.

The city council hearing on the appeal was held on April 19, 2016. The city council was shown the visual simulations of the design of the Project. A city council

staff member advised the city council that with mitigation there would be no significant environmental impacts; a Negative Declaration was appropriate. The staff member discounted all of Plaintiff's arguments: a new hydrology study would be completed prior to final approval; nothing in Plaintiff's letter provided new information; and there were no violations of the zoning ordinance or state planning laws. Plaintiff was allowed to make numerous comments on the Project. The architect for the Project testified as to all the things done to preserve the hillside and views.

Residents of surrounding homes testified as to their concerns about views and privacy. Other residents testified in favor of the Project, recognizing they were aware when they purchased their homes that there was a graded lot that would have a home on it at some point. Members of the Enclave HOA testified that many of the requirements for landscaping were directed by the HOA. Real Parties had been very accommodating as to protecting the area around the Project site.

A city council staff member showed the Council a graphic that identified the Project as clearly being in Area III of the Specific Plan. Additionally, Municipal Code section 9.140.040 specifically grandfathered-in existing specific plans so the hillside conservation overlay zone did not apply to the Project.

The appeal was denied. The notice of determination was filed on June 23, 2016.

E. TRIAL COURT PROCEEDINGS

1. *PETITION FOR WRIT OF MANDATE*

On May 17, 2016, Plaintiff filed the Petition. Plaintiff alleged that the City violated CEQA by approving the development of Real Parties' home based on a Negative

Declaration rather than an EIR because there was a fair argument that the Project would have significant adverse impacts on land use, hydrological, aesthetic, biological, noise and air quality impacts. Plaintiff claimed this would be the first single family residence allowed to be constructed on the steep hillside areas of La Quinta. Since the Project would be 40 feet above all other development in the area, it would be highly visible. Further, the General Plan designated the area as natural open space. Peninsular Bighorn sheep had been "observed on the site." Flooding and mudslides had occurred on and near the Project in prior years. Approval of the conditional use permit violated state planning laws and zoning ordinances, and the City's Municipal Code, because the development was inconsistent with the natural open space designation and zoning of the Project site.

Plaintiff's first cause of action was for a violation of CEQA by approving a Negative Declaration and not preparing an EIR. The Negative Declaration failed to discuss the inconsistency of land use, the hydrological impacts, biological impacts or the aesthetic impacts. He insisted the General Plan allowed for "little development" in natural open space. Further, the City was incorrect that the Project site was part of the existing Specific Plan. The hydrological impacts were not adequately addressed and could not be postponed until after approval of the Project. Also, there was no consideration of the Peninsular Bighorn sheep on the Project. The Project would create significant noise and vibration during construction. The vibrations would disturb the Peninsular Bighorn sheep.

The second cause of action was for a violation of state planning law. The Project was inconsistent with the General Plan designation of natural open space. The General

Plan did not include any allowances for residential development on sites designated natural open space. In addition, the Project was inconsistent with the Specific Plan.

The third cause of action was for a violation of Municipal Code section 9.120.020. The code required that for the approval of a conditional use permit, the City must first make a finding that it was consistent with the General Plan. Further, the approval of a conditional use permit required that the conditional use permit comply with CEQA.

Plaintiff filed a request for judicial notice of the General Plan adopted by the City on February 19, 2013, and amended on November 19, 2013. He also sought notice of several sections of the Municipal Code.

The General Plan provided that specific plans must be consistent with the General Plan. The General Plan discussed natural open space. It provided, "The land use designation is applied to areas of natural open space, whether owned by private parties or public entities. With the exception of trail or trailhead development, little development is permitted in this designation."

In addition, the General Plan required that in conjunction with the entitlement process of development proposed within designated natural open space land, that a biological resource survey be conducted. It also included another policy that "Any development that is permitted within areas designated as Open Space should minimize grading for structures."

2. *OPPOSITION TO PETITION*

Real Parties and the City filed joint opposition to the Petition. For the first time, they noted that single family residences are exempt from CEQA pursuant to Guidelines

section 15303, subdivision (a), but the City prepared a Negative Declaration, which was supported by numerous technical studies. The Negative Declaration complied with CEQA. The planning commission unanimously approved the Project and the appeal was denied by the city council.

They also contended that the City was a charter city and not a general law city. As such, the City was not subject to the Government Code consistency requirement unless it had chosen to adopt the consistency requirement. The City only required the planning commission to find that the land use authorized by the conditional use permit was consistent with the General Plan and zoning ordinances.

In addition, the City argued that the General Plan provided that "little development" could occur in natural open space. Over two thousand acres of natural open space had already been developed and the Municipal Code allowed for development in natural open space with a conditional use permit. Further, only .6 acres of the Project site was being developed. Moreover, the General Plan included rules about development on natural open space; there would no need for development standards in the General Plan for natural open space if no development was contemplated. The Specific Plan and Municipal Code section 9.120.020 specifically provided that a single family residence could be developed on the Project site. Additionally, the Specific Plan was previously found to be consistent with the General Plan and that finding had never been challenged. Real Parties and City insisted that Plaintiff failed to support any of his claims of biological, aesthetics or noise impacts, which required an EIR. The Project would hardly

be noticeable from distant views and there was no evidence it could be seen from the valley floor.

The City and Real Parties objected to Plaintiff's request for judicial notice of the General Plan document provided by Plaintiff as it was incomplete. The City provided its own copy of the General Plan, a copy of the City charter, the amended Specific Plans, and several Municipal Codes. The Charter included language, 'In the event of any conflict between the provisions of this Charter and the provisions of the general laws of the State of California, the provisions of this Charter shall control."

3. *PLAINTIFF'S REPLY BRIEF*

On January 2, 2017, Plaintiff filed his reply to the opposition. He filed an amended reply on January 25, 2017.[4] Plaintiff insisted that the City and Real Parties failed to counter expert evidence that the Project would have significant impacts on the environment, which would require preparation of an EIR. Plaintiff's recognized the argument by the Real Parties and the City that the Project was subject to a categorical exemption. Plaintiff insisted that since mitigation measures were required, the categorical exemption did not apply, citing to *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108.

[4] Plaintiff amended the brief a third time to include the correct citations to the administrative record.

In addition, for the first time, Plaintiff referred to the EIR report prepared with the General Plan.[5] Plaintiff insisted that it was part of the General Plan and that the trial court had been asked to take judicial notice of the General Plan. The EIR included that development was not intended for land designated natural open space. Plaintiff insisted the fact La Quinta was a charter city did not change the analysis because it had adopted the consistency requirement.

4. *RULING*

On May 23, 2017, the trial court issued its tentative ruling, which it later adopted. The trial court summarized the facts; it noted that the Petition set forth three causes of action: (1) violation of CEQA; (2) violation of state planning law; and (3) violation of Municipal Code section 9.210.020. The trial court took judicial notice of the following: Charter of the City of La Quinta; Chapters 1 through 3 of the General Plan; City of La Quinta ordinance No. 512 (Zoning Ordinance Amendment); Resolution 97-74 (Amendment #4 to Specific Plan); Resolution 2001-85 (Amendment #5 to Specific Plan); and Municipal Code sections 6.08.050, 9.60.230, 9.100.210, 9.110.030, 9.110.050, 9.110.070, 9.210.020, 9.220.020 and 13.24.120. It declined to take judicial notice of the EIR prepared with the General Plan since it was submitted with Plaintiff's reply brief and it was not relevant.

The trial court first concluded the Project was within the Enclave in Specific Plan Area III. The Project site had been zoned low density residential and no amendments to

[5] Plaintiff requested judicial notice of the EIR and City and Real Parties objected.

the Specific Plan changed the zoning. The Project site was clearly in the Enclave as evidenced by the Real Parties having to enter into a settlement agreement with the Enclave HOA to develop the Project. Plaintiff had failed to present any evidence to the contrary.

Next, the trial court found the Project was consistent with the General Plan because the Specific Plan itself found it was consistent with the General Plan and that determination had never been challenged. Further, the trial court rejected that the Project was subject to the zoning regulations for hillside conservation overlay zoning, which restricted development. Municipal Code section 9.140.040 exempted any tracts or specific plans already approved. The tract was approved and the Specific Plan was adopted prior to the Municipal Code.

The trial court then addressed each of the possible environmental impacts of the Project. It found Plaintiff had provided no evidence that improvement of the existing graded building pad and road would significantly alter the drainage pattern. Approval of the final drainage system after the Negative Declaration and conditional use permit was approved did not violate CEQA.

The trial court rejected that the aesthetic impacts required an EIR. Plaintiff failed to provide any reliable evidence that the Project would be seen by anyone outside the immediate neighbors. Further, the visual simulations provided by Plaintiff were all prepared from the view of his backyard. CEQA did not protect private views.

The trial court found no significant noise and vibration impacts.

The trial court then addressed Plaintiff's argument that the Project violated state planning law because it was inconsistent with the General Plan and violated Municipal Code section 9.210.020, which required the City to find that a project is consistent with the General Plan prior to approving a conditional use permit. The trial court found Plaintiff failed to show that the Project violated the General Plan because it was located within or near a critical wildlife habitat. Further, the General Plan included language that any development permitted within areas designated as natural open space should minimize grading for structures and access, and should be visually subordinate to and compatible with surrounding landscape features. The Negative Declaration showed that the Project would blend into the surrounding landscape and would require minimum expansion of the existing access road. As such, the trial court found the City's determination that the Project was consistent with the General Plan was adequately supported.

Argument was heard on May 15, 2017. Plaintiff's counsel insisted that the EIR prepared with the General Plan was properly noticed. It provided that there would be no development in natural open space areas. Plaintiff then reiterated his argument about inconsistency and violations of CEQA. The reference to "little development" in the General Plan did not include residential.

Judgment was entered denying the Petition on June 13, 2017, adopting the tentative ruling. Plaintiff filed his notice of appeal on August 13, 2017.

DISCUSSION

A. JUDICIAL NOTICE

In his opening brief, Plaintiff refers to the EIR report prepared at the time of the adoption of the General Plan. He has asked this court to take judicial notice of the EIR. However, the trial court refused to take judicial notice because it was not in the administrative record, it was requested at the time Plaintiff filed his reply brief and it was not relevant. "An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance." (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326.) "While the reviewing court may take judicial notice of matters not before the trial court, it need not do so." (*Id.* at p. 325.) Plaintiff failed to properly present this evidence for consideration by the trial court. The EIR was not part of the administrative record. The trial court refused to take judicial notice of the EIR. Moreover, we do not see it as being relevant to the issues in this case. We decline to take judicial notice of the EIR.[6]

B. CEQA STANDARDS AND REVIEW

"CEQA was enacted to advance four related purposes: to (1) inform the government and public about a proposed activity's potential environmental impacts; (2) identify ways to reduce, or avoid, environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation measures when

[6] Respondents' motion to strike filed December 13, 2017, is denied.

feasible; and (4) disclose to the public the rationale for governmental approval of a project that may significantly impact the environment." (*California Building Industry Assn. v. Bay Area Quality Management Dist.* (2015) 62 Cal.4th 369, 382 (*California Building*).)

Guidelines section 15063 provides, "Following preliminary review, the lead agency shall conduct an initial study to determine if the project may have a significant effect on the environment." "Among the purposes of the initial study is to help 'to inform the choice between a Negative Declaration and an environmental impact report (EIR).' [Citation.] If there is 'no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,' the agency prepares a Negative Declaration. [Citation.] Alternatively, if ' "the initial study identifies potentially significant effects on the environment but revisions in the project plans 'would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur' and there is no substantial evidence that the project as revised may have a significant effect on the environment, a mitigated Negative Declaration may be used." ' [Citation.] Finally, if the initial study uncovers 'substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment' [citation], the agency must proceed to the third tier of the review process and prepare a full EIR (environmental impact report)." (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 704-705, fn. omitted; see also *California Building*, *supra*, 62 Cal.4th at p. 382.)

CEQA defines "[s]ignificant effect on the environment [as] a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant." (§ 15382.) " 'Substantial evidence' . . . means 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (§ 15384, subd. (a).) Substantial evidence "shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (§ 15384, subd. (b).) "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (§ 15384, subd. (a).) "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not constitute substantial evidence.' " (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 690.)

"An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens*

for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 427; *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 816-817.) It remains a plaintiff's burden to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact. (*Joshua Tree Downtown Business Alliance v. County of San Bernardino, supra,* 1 Cal.App.5th at p. 688.)

C. CEQA EXEMPTION

The City and Real Parties first stated in the trial court in the opposition to the Petition that the City could have invoked the categorical exemption of Guidelines section 15303, subdivision (a), which exempts a single family residence from CEQA review. The trial court never addressed the issue in its written ruling. The City and Real Parties briefly mentioned the exemption in a footnote in the respondents' brief but did not argue at length that the exemption should be applied on appeal. The parties have had an opportunity to address the issue in supplemental briefing.

As previously stated, CEQA requires that agencies follow a three-step process when planning an activity that could fall within its scope. In the second step, "if the proposed activity is a project, the agency must next decide whether the project is exempt from the CEQA review process under either a statutory exemption [citation] or a categorical exemption set forth in the CEQA Guidelines [citation]. If the agency determines the project is not exempt, it must then decide whether the project may have a significant environmental effect. And where the project will not have such an effect, the agency 'must "adopt a Negative Declaration to that effect." ' [Citation.] [¶] Third, if the

agency finds the project 'may have a significant effect on the environment,' it must prepare an EIR before approving the project.' " (*California Building*, *supra*, 62 Cal.4th at p. 382, fn. omitted.)

"For policy reasons, the Legislature has expressly exempted several categories of projects from review under CEQA. [Citation.] By statute, the Legislature has also directed the Secretary of the Natural Resources Agency (Secretary) to establish 'a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from' CEQA. [Citation.] 'In response to that mandate,' the Secretary 'has found' that certain 'classes of projects . . . do not have a significant effect on the environment' and, in administrative regulations known as guidelines, has listed those classes and 'declared [them] to be categorically exempt from the requirement for the preparation of environmental documents.' " (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1092 (*Berkeley*).)

Guidelines section 15300 et seq. provides for categorical exemptions. Guidelines section 15303 provides, "Class 3 consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include but are not limited to: [¶] (a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption."

However, the application of the categorical exemption is not absolute. Guidelines section 15300.2 provides for exceptions to the Class 3 categorical exemption. "Guidelines section 15300.2, subdivision (c), provides: 'A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.' The plain language of this provision supports the view that, for the exception to apply, it is not alone enough that there is a reasonable possibility the project will have a significant environmental effect; instead, in the words of the Guideline, there must be "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.' " (*Berkeley*, *supra*, 60 Cal.4th at pp. 1097-1098.)

"CEQA does not generally impose procedural requirements, including for a public hearing, on an agency making an exemption determination and most statutory exemptions do not require findings to document the basis for the claimed exemption, . . . Once it has been properly determined that an exemption from CEQA applies, an agency need not conduct further analysis or progress to the second or third tiers of the scheme's environmental review." (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 966-967.)

Several cases have found that despite an agency initially choosing not to invoke a statutory exemption, it could raise the issue later in the process. In *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 180 (*Del Cerro*), the court held an agency that prepared an EIR for a road grade separation project did not forfeit its right to argue no EIR was required on appeal because a CEQA statutory exemption applied.

Quoting *Santa Barbara County Flower and Nursery Growers Association, Inc. v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, 876 (*Santa Barbara*), the court explained, " 'Under the doctrine of equitable estoppel, a party cannot deny *facts* that it intentionally led another to believe if the party asserting estoppel is ignorant of the true facts, and relied to its detriment. . . . [E]stoppel did not prevent a county from raising the statutory exemption for the first time *after* a party began litigation challenging the adequacy of the County's EIR under CEQA . . . Nothing in the record shows that the [challenger] was unaware of the exemption, or that the County's decision to prepare an EIR prevented the [challenger] from ascertaining the applicable law.' " (*Del Cerro*, at pp. 179-180.)

In *Santa Barbara*, the issue on appeal was the exemption under section 21080.5, which provides that "when the regulatory program of a state agency requires a plan or other written documentation containing environmental information and complying with paragraph (3) of subdivision (d) to be submitted in support of an activity listed in subdivision (b), the plan or other written documentation may be submitted in lieu of the environmental impact report required by this division if the Secretary of the Resources Agency has certified the regulatory program pursuant to this section." This statutory exemption requires review of whether the local procedure used by the agency in lieu of an EIR qualifies and is not a factual inquiry. (*Santa Barbara*, *supra*, 121 Cal.App.4th at pp. 871-872.)

Here, the City never invoked the categorical exemption during the process. Both the planning commission and city council reviewed the Project based on the Negative Declaration. Although *Del Cerro* and *Santa Barbara* allowed for the agency to invoke an

exemption for the first time on appeal, as pointed out by Plaintiff, those cases involved *statutory exemptions.* " 'A critical difference between statutory and categorical exemptions is that statutory exemptions are absolute, which is to say that the exemption applies if the project fits within its terms. Categorical exemptions, on the other hand, are subject to exceptions that defeat the use of the exemption and the agency considers the possible application of an exception in the exemption determination." (*North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 850; see also *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 224 [" '[S]tatutory exemptions are absolute, which is to say that the exemption applies if the project fits within its terms' "].)

Further, *Del Cerro* and *Santa Barbara* did not address Guidelines section 15062. That section provides that when "a public agency decides that a project is exempt from CEQA . . . and the public agency approves or determines to carry out the project, the agency may file a notice of exemption. The notice shall be filed, if at all, after approval of the project." That notice must give a description of the project, the location, the finding that it is exempt and "[A] brief statement of reasons to support the finding." (Guidelines, § 15062, subds. (a)(1)-(a)(5).) "The filing of a Notice of Exemption and the posting on the list of notices start a 35 day statute of limitations period on legal challenges to the agency's decision that the project is exempt from CEQA." (Guidelines, § 15062, subd. (d); see also *Muzzy Ranch Company v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380 [agency need only prepare and file a notice of

exemption].) None of these procedures were discussed in *Del Cerro* or *Santa Barbara* as they apply to categorical exemptions.

Categorical exemptions are more properly raised by the agency in the initial review process rather than first being raised on appeal so that proper notice can be given and the exceptions to the categorical exemption can be addressed by either the agency or opponents. Here, there is nothing that this court can review as to the determination of the categorical exemption, or any exceptions, and the City did not follow the proper notice procedures.

Certainly, it would be appropriate to remand this case for the City to invoke the categorical exemption, post the notice and allow for comment on the exception to the exemptions to protect Real Parties' interests. However, such remand would again delay the Project. It was not the fault of the Real Parties that the City chose to proceed with a Negative Declaration rather than impose the categorical exemption. It would punish only Real Parties to remand and develop the evidence. Since we conclude *post* that the trial court properly denied the Petition because the City properly adopted a Negative Declaration and the Project was consistent with the General Plan, we will affirm that ruling on appeal so that the Project may proceed in a timely manner.

D. REQUIREMENT OF AN EIR

Plaintiff raises three claims on appeal as to why the City should have required an EIR for the Project and therefore erred by adopting the Negative Declaration.[7] First, Plaintiff claims the Negative Declaration failed to adequately address that the Project may be inconsistent with the General Plan land use designation of natural open space for the Project site.[8] Further, the Project would have significant hydrological impacts, which required an EIR. Finally, substantial evidence that a fair argument can be made that the Project would have significant aesthetic impact due to damage to scenic resources.

1. *LAND USE*

A Negative Declaration is appropriate if the initial study identifies significant effects, but "Revisions in the project plans or proposals made by or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur," and "There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect

[7] As recognized by the City and Real Parties, Plaintiff makes two claims regarding consistency with the General Plan. We will address his second contention *post*.

[8] The City and Real Parties argue that since La Quinta is a charter city, the Specific Plan need not be consistent with the General Plan. They argue the City did not adopt the state law consistency requirement for Specific Plans and zoning ordinances in its General Plan. This argument was not presented to the city council or planning commission and the trial court did not address this issue despite it being raised in the opposition to the Petition. Since we conclude the Specific Plan and zoning ordinances are consistent with the General Plan, we decline to address whether the General Plan adopted a consistency requirement under state planning law.

on the environment." (Guidelines, § 15070, subd. (b).) A Negative Declaration shall contain the "mitigation measures . . . included in the project to avoid potentially significant effects." (Guidelines, § 15071, subd. (e).)

Guidelines section 15063, subdivision (d)(5) provides that an initial study shall examine "whether the project would be consistent with existing zoning, plans, and other applicable land use controls." Here, in the Negative Declaration , the City found that the Project was currently designated natural open space in the General Plan and natural open space with hillside conservation overlay in the zoning ordinance. However, it was within Area III of the Specific Plan, which allowed for a residence on the Project site. Moreover, the processing of the conditional use permit was consistent with the City's standards, in both its General Plan and zoning ordinance, relating to development on the hillsides. With approval of the conditional use permit, the project would be consistent with the General Plan and zoning ordinances.

The planning commission adopted the Negative Declaration finding that it was consistent with the General Plan. Further, the planning commission's staff report noted that the Specific Plan designated the Project site as low density residential, which was consistent with the General Plan, and that the City's zoning ordinance allowed for a single family residence on the Project site with a conditional use permit.

Courts have found that decisions regarding consistency with a general plan are reviewed for abuse of discretion under the arbitrary and capricious standard. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782; see also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229

Cal.App.4th 498, 514; *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563.) "[A]ppellate courts 'review decisions regarding consistency with a general plan under the arbitrary and capricious standard. These are quasi-legislative acts reviewed by ordinary mandamus, and the inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. [Citations.] Under this standard, we defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it." (*San Francisco Tomorrow,* at p. 514.)

"A project is consistent with the general plan ' "if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." ' [Citation.] A given project need not be in perfect conformity with each and every general plan policy. [Citation.] To be consistent, a subdivision development must be 'compatible with' the objectives, policies, general land uses and programs specified in the general plan." (*Families Unafraid to Uphold Etc. County v. Board of Supervisors.* (1998) 62 Cal.App.4th 1332, 1336.)

"It is not for us to substitute our judgment for that of a local agency in making a determination of consistency; rather, the agency's determination 'comes to this court with a strong presumption of regularity.' [Citation.] 'Once a general plan is in place, it is the province of elected [agency] officials to examine the specifics of a proposed project to determine whether it would be "in harmony" with the policies stated in the plan. [Citation.] It is, emphatically, not the role of the courts to micromanage these development decisions.' [Citation.] Thus, as long as the [local agency] reasonably could

have made a determination of consistency, [its] decision must be upheld, regardless of whether we would have made that determination in the first instance." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 638.)

In *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, it was argued by the Real Parties on appeal that " 'Consistency with any local agency's land use plan or policies . . . is evaluated under the "substantial evidence" ' standard, not the 'fair argument' test." (*Id.* at p. 933.) The appellate court disagreed. It found, "Because the land use policies at issue were adopted at least in part to avoid or mitigate environmental effects, we consider their applicability under the fair argument test with no presumption in favor of the City." (*Id.* at p. 934.) *Pocket Protectors* differs from this case as the Project site here was zoned low density residential, and the General Plan did not override the Specific Plan. The land use policy was not based on mitigating measures.

The development of a single family residence on the Project site was not inconsistent with the General Plan. Plaintiff contends that the Specific Plan was never found to be consistent with the 2013 General Plan, as determined by the trial court in denying the Petition, because it was adopted and amended prior to the date the General Plan was adopted. However, as noted by the City and Real Parties, the General Plan documented that there were existing specific plans in place which regulated land use and provided detailed information regarding particular parcels or area. This clearly supports that the City intended any existing specific plans to continue to be valid after adoption of the General Plan.

The General Plan provided, "The City has a number of approved and active Specific Plans governing development of residential, commercial and resort projects. Many of these have been built out, and some still have available development areas." The General Plan also included language, "Specific Plans will continue to be a valuable tool for creative development in the City. . . . Specific plans can provide for changes and easing of zoning standards, when the quality of the development and/or amenities compensate for these changes. . . . " The Negative Declaration stated that the area was designated natural open space by the General Plan but the Specific Plan was the applicable zoning regulation which allowed a residence on the location.

There is no language in the General Plan provided in the record that the City intended to eliminate the existing Specific Plan. Plaintiff's argument that a general plan takes precedent over all other specific plans or zoning is not supported by the language of the General Plan. Further, by adopting the General Plan, and keeping the existing specific plans, the City impliedly determined that the Specific Plan was consistent with the General Plan's goals and policies. This was never challenged by Plaintiff at the time the Specific Plan was adopted or subsequently amended, or at the time of the adoption of the General Plan.

Moreover, the Specific Plan does not "frustrate" the policies of the General Plan. Certainly, the City consisted of other developed natural open space lands and this was only a three-acre parcel. The entire mountain range behind the Project site was natural open space. This decision by the City to provide for development of the Project which

was already surrounded by single family residences on three sides was not arbitrary or capricious.

Additionally, even if the Project was natural open space designated land, it was not inconsistent with the plain language of the General Plan, as found by the planning commission and the city council, as the General Plan gave the agencies the discretion to allow for development in the open space designated areas. Policy OS-2 1 of the General Plan provides, "Unique and valuable biological resources should be preserved as natural open space, to the greatest extent practical." Policy OS-3 1 of the General Plan provides "To the greatest extent possible, prohibit development on lands designated as natural open space which are elevated and visually prominent form adjacent developed areas or are located within or in close proximity to areas defined as critical wildlife habitat." Most importantly, Policy OS-3 2 provides, "Any development that is permitted within areas designated as natural open space should minimize grading for structures and access and should be visually subordinate to and compatible with surrounding landscape features."

Here, less than one acre of the 3.16 acre of the Project site was being developed. It was to be built in the area already graded for the building pad and the driveway was already present on the Project site. Even if the Project site was natural open space, the City could allow for development. The agency did not violate CEQA by allowing for the development of a single family residence on the Project site, which was zoned residential and in an area surrounded by other single family residences.

Plaintiff contends that this would be the first residential development on natural open space. Plaintiff sites to a land use summary chart in the General Plan. In that chart, under open space, there is no listing of the existing square footage or potential square footage in natural open space areas. Initially, the Specific Plan designated this Area III as a low density residential; it was not natural open space. This is not evidence that absolutely no residential development was allowed on the Project site. Moreover, even if it was the first residential development on natural open space land, it was not inconsistent with the language in the General Plan.

Further, Municipal Code section 9.120.020 allowed for single family residences to be built in natural open space with a conditional use permit. If such development was prohibited in natural open space designated zones, it would not make sense that the City would have adopted such a Municipal Code.

To the extent Plaintiff argues that the Project Site was not in fact in Area III of the Specific Plan, that bald assertion was countered by Criste. Criste prepared detailed maps that showed the Project site was in Area III. There simply is no evidence to support Plaintiff's claim.

The Negative Declaration addressed the consistency of the Project and the General Plan. It concluded it was part of Area III of the Specific Plan, which allowed for residential development. This conclusion was not arbitrary and capricious. There was no violation of CEQA by concluding there was no inconsistency.

2. *HYDROLOGICAL IMPACT*

Plaintiff complains the Project required an EIR because of the hydrological impacts. In his opening brief, Plaintiff argues that heavy storms in 2013 and 2104 caused significant flooding of homes in the Enclave Estates. Plaintiff stated, "While the Project would not add more runoff, it would add pollutants to that runoff that must be addressed." Plaintiff cites to evidence that the Project would generate pollutants. The Negative Declaration provided for a retention system that would filter out the pollutants. Plaintiff's own expert found that runoff from the undeveloped land would inundate the undersized retention system. Plaintiff argues the runoff from the undeveloped areas would be polluted by the developed areas. Plaintiff additionally contends the City's agreement to review the final drainage system after approving the Project violated CEQA.

There is no substantial evidence in the administrative record showing the Project's hydrological elements may have a significant effect on the environment. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1040.)

In the Negative Declaration , the City concluded that the Project would not violate any water quality or waste discharge standards. The Project would have less than a significant impact on the alteration of the existing drainage or create additional runoff water. The City would require a final plan that would control polluted runoff during both construction and long term. The plan would have to comply with the 100-year storm requirement of the City, which would maintain the water runoff similar to its current

state. The City engineer would continue to review the hydrology factors on the Project site. None of these measures were mitigating measures but rather were requirements of the City that it retain water from the 100-year storm.

Here, Plaintiff and other neighbors complained about flooding from the site in 2013 and 2014. The proposed changes to the Project site would actually improve the threat of flooding. While we are aware that the initial hydrological study only examined the developed portion of the Project site, it was to be corrected to comply with the City requirements. No substantial evidence in the record shows that the hydrological element will have a significant effect on the environment.

Plaintiff also claims that deferral of the final drainage and retention system until the grading permit was sought violated CEQA. "[W]hen a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, . . . the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study." (*California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at p. 621.) Guidelines section 15074, subdivision (d) provides, "When adopting a mitigated negative declaration, the lead agency shall also adopt a program for reporting on or monitoring the changes which it has either required in the project or made a condition of approval to mitigate or avoid significant environmental effects." Here, the City specially required the

City engineer to have the final approval of the Project so it complied with the City water requirements. This satisfied the CEQA Guidelines.

3. *AESTHETICS*

"[A]ny substantial, negative effect of a project on view and other features of beauty could constitute a 'significant' environmental impact under CEQA." (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604.)

"'Under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons.' [Citation.] Furthermore, '[t]he possibility of significant adverse environmental impact is not raised simply because of individualized complaints regarding the aesthetic merit of a project.' " (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1042.) "That a project affects only a few private views may be a factor in determining whether the impact is significant." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402.)

The best example of the aesthetics of the Project is provided by a Google earth map. It is an overview of the City of La Quinta. The location of the Project is marked by a dot. On the side of the mountain range where the Project is located, the other surrounding homes are equally visible. Further, on the other side of the mountain, there are homes that go into the hillside similar to the Project. No other evidence provides a distant view of the Project site from the valley floor.

Further, there is no substantial evidence creating a fair argument that the Project is visually out of character with the surrounding community. There are large single family residences on three sides of the Project. Further, as stated, the Project is consistent with existing zoning and all other land use regulations. The simulations for the Project prepared by Real Parties clearly depicted a home that blended into the desert landscape. It was deliberately placed in the back of the lot in order to minimize the impact on the surrounding neighbors.

The visual simulations prepared by Plaintiff were only from the perspective of his backyard. However, this was not substantial evidence that the visual impacts were would affect the environment of persons in general, notjust a few surrounding homeowners. Additionally, several surrounding residents testified they were happy with the design of the Project.

The City properly adopted the Negative Declaration. An EIR was not required as there was no substantial negative effect on the views and other features of beauty that could constitute a significant environmental impact under CEQA. (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*, *supra*, 29 Cal.App.4th at p. 1604.)

C. INCONSISTENCY WITH GENERAL PLAN

Similar to his claim that the inconsistency of the Project with the General Plan natural open space designation required the preparation of an EIR, Plaintiff additionally contends the inconsistency with the General Plan negates the approval of the conditional use permit as it is inconsistent with state planning law. He insists that even though the General Plan referred to "little development" it did not intend to include the Project; it

only applied to the development of parks and utilities. Further, the City's approval violated Municipal Code section 9.210.020 which requires a conditional use permit be consistent with the General Plan. Finally, the approval of the Project violated the regulations for the hillside conservation overlay.

Government Code section 65860, subdivision (a) provides "County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974." "[Government Code s]ection 65860 imposed a duty on local governments to make their zoning ordinances consistent with the general plan by January 1974, and requires them to continue to amend zoning ordinances consistently with any amendments to the plan." (*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 1213-1214, fn. omitted.)[9]

Government Code section 65454 applies to specific plans and provides "No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." "A zoning ordinance that conflicts with a general plan is invalid at the time it is passed. [Citation.] The court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the ordinance." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544.)

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[9] Again, we make no specific finding that La Quinta, a charter city, adopted the consistency requirement.

As stated *ante*, we review the claim under the arbitrary and capricious standard. (*Endangered Habitats League, Inc. v. County of Orange*, *supra,* 131 Cal.App.4th at p. 782.)

We have concluded the General Plan adopted in 2013 carried forward the Specific Plan. As such, the City in adopting the General Plan had to necessarily conclude the Specific Plan was consistent with the General Plan. Further, the evidence overwhelmingly supported that the Project site was in Area III of the Specific Plan. As such, the Project site was zoned low density residential. The approval of the Project was not inconsistent with the General Plan.

Additionally, the City could issue the conditional use permit for the Project under Municipal Code section 9.210.020. That provision provides that a single family residence can be approved in natural open space with a conditional use permit. Again, this approval of the Project was consistent with the General Plan because (1) it specifically adopted the Specific Plan; and (2) development was permitted in natural open space. There was no inconsistency between the zoning ordinance and the General Plan.

Further, to the extent Plaintiff contends that development was not permitted in the hillside conservation overlay zone as set forth in Municipal Code section 9.140.040, it is without merit. Subdivision (c)(2) of section 9.140.040 provides that, "The following are exempt from the requirements of this section: tracts and specific plans already approved." Plaintiff insists that the Project site was not in Area III of the Specific Plan and was not zoned residential. We have already rejected this argument.

Plaintiff has failed to show any inconsistency in the approval of the Project to the General Plan under state planning law or the zoning ordinances.

DISPOSITION

We affirm the denial of Plaintiff's Petition. Real Parties and City are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.